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ALEXANDER L. STEVAS,

No. 82-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

THE WASHINGTON POST COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statutes that authorize expenditures out of a special appropriation for "unforeseen emergencies arising in the diplomatic and consular service" are within the scope of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(3), thereby protecting the records of such expenditures from public disclosure.

2. Whether the nine specific statutory exemptions, 5 U.S.C. § 552(b)(1)-(9), constitute the sole source for determining if records of such expenditures are exempt from the mandatory disclosure provisions of FOIA.

RULE 28.1 LISTING

The following are subsidiaries of respondent The Washington Post Company: Newsweek, Inc. (wholly owned subsidiary); Newsweek Services, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Inc. (wholly owned subsidiary); Post-Newsweek Stations, Florida, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Connecticut, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Michigan, Inc. (wholly owned second-level subsidiary); Post-Newsweek Video, Inc. (wholly owned second level subsidiary); Legi-Slate, Inc. (wholly owned subsidiary); Bowater Mersey Paper Company Ltd. (49% ownership); Robinson Terminal Warehouse Corp. (97.2% ownership); Los Angeles Times-Washington Post News Service (50% ownership); International Herald Tribune, S.A. (30% ownership); The Daily Herald Company (wholly owned subsidiary); Newsprint, Inc. (wholly owned subsidiary); Bear Island Paper Co. (33.3% ownership); SportsView New York, Inc. (wholly owned subsidiary); and SportsView New England, Inc. (wholly owned subsidiary).

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STATEMENT OF THE CASE

On October 5, 1979, respondent The Washington Post Company ("The Post"), through its reporter Ronald Kessler, filed a request with the Department of State pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1976 & Supp. V 1981), for records consisting of "ledger sheets and schedules of disbursements and receipts of the Secretary of State's Emergency Fund . . . " C.A. App. 9. The request was for records "for the past three years only."

By letter dated October 29, 1979, Under Secretary of State for Management, Benjamin H. Read, informed Kessler that such records would not be made available under FOIA because they were "exempt by law from public disclosure under authority of 22 U.S.C. 2671 and 31 U.S.C. 107 . . . These records, or portions of records are exempt from disclosure under Section (b)(3) of the Freedom of Information Act (5 U.S.C. 552(b)." C.A. App. 10-11.

The first statute relied upon by Under Secretary Read, 22 U.S.C. § 2671, provides that the Secretary of State is authorized to "make expenditures . . . for unforeseen emergencies arising in the diplomatic and consular service," and to account for those expenditures in accordance with 31 U.S.C. § 107. *See* Petition for Writ of Certiorari at 39a (hereafter Petition). Section 107 of Title 31, in turn, provides that the President "may," if he "think[s] it advisable," account for expenditures secretly by "certificate." *See id.* at 40a.[1]

The appropriation for unforeseen emergencies arising in the diplomatic and consular service (the "Emergency Fund") is a line item in the budget of the Department of State. For the fiscal year ending September 30, 1980, for example, Congress appropriated $2,350,000 "[f]or expenses necessary to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service . . . ." Pub. L. No. 96-68, 93 Stat. 417 (1980).[2]

Kessler filed a written appeal from the denial of his FOIA request, C.A. App. 12-15, arguing that neither 22 U.S.C. § 2671 nor 31 U.S.C. § 107 offer the Secretary of State any criteria, standards, or guidelines for the decision to withhold records, and therefore neither statute meets the requirements of Exemption 3 of FOIA. That exemption provides that FOIA does not apply to materials

> specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a man-

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[1] 22 U.S.C. § 2671 was enacted in 1956; Section 107 of 31 U.S.C. was enacted in 1921. After the decision below, Title 31 was recodified without substantive change and Section 107 is now Section 3526(e). For consistency, respondent cites Title 31 in the same manner as petitioners. *See* Petition at 3 n.1.

[2] Congress has used identical language in all appropriation acts pertinent to this lawsuit. *See* Pub. L. No. 94-362, 90 Stat. 938; Pub. L. No. 95-86, 91 Stat. 420; Pub. L. No. 95-431, 92 Stat. 1022.

> ner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The appeal was denied, C.A. App. 16, and on May 1, 1980, The Post brought suit in the United States District Court for the District of Columbia in order to enforce its rights under FOIA. C.A. App. 14-16. During the course of discovery, the government admitted in answer to an Interrogatory that "there are no written policy statements, regulations, guidelines, standards, or criteria other than those set forth in 22 U.S.C. Section 2671 and 31 U.S.C. Section 107 by which the Under Secretary of State for Management determines which expenditures from the appropriation for Emergencies in the Diplomatic and Consular Service are to be accounted for in accordance with 31 U.S.C. Section 107." C.A. App. 19-20. The government also provided The Post with certain documents describing the uses of the Emergency Fund which already had been disclosed. C.A. App. 23-52.

On September 30, 1980, the government moved for summary judgment, C.A. App. 53, arguing that 31 U.S.C. § 107, 22 U.S.C. § 2671, and Pub. L. No. 96-68, 93 Stat. 417, taken together, are sufficient to meet the requirements for exemption from disclosure established by Exemption 3 of FOIA. The Post cross-moved for summary judgment on the ground that the statutes in question on their face give to the Secretary of State unfettered discretion whether to disclose the records sought and hence do not qualify under Exemption 3. C.A. App. 72. In addition, The Post opposed the government's motion for summary judgment on the ground that there were genuine issues of fact in the record concerning whether certain expenditures had been properly allocated. C.A. App. 77-78. The record indicated, for example, that in the past the Secretary had allocated to this appropriation such predictable and routine items as receptions for those who had contributed to the State Department's Fine Arts

Committee,[3] and "official . . . state dinners, luncheons and receptions" for visiting heads of state.[4] The record also demonstrated that at one time the Secretary of State allocated to the Emergency Fund appropriation expenditures used to reimburse Foreign Service Inspectors for certain foreseeable expenses.[5] Such expenditures, The Post contended, raised a material question of fact concerning whether the records the government sought to hold secret on the basis of 22 U.S.C. § 2671 and 31 U.S.C. § 107 were properly so withheld, even assuming that the district court were to hold that these statutes fell within the protection of Exemption 3 of FOIA.

The district court, in ruling on the motions for summary judgment, agreed with The Post that Exemption 3 of FOIA "does not apply in this case." C.A. App. 161:

> Under 22 U.S.C. § 2671 (1976), the Secretary of State simply is authorized to spend funds "for unforeseen emergencies arising in the diplomatic and consular service" and "may" account for those funds with the certification procedure set forth in 31 U.S.C. § 107 (1976). He also "may not" decide to use the certification procedure, however, and no guidance is provided as to when that discretion should be exercised. The wording of 31 U.S.C. § 107

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[3] This information was provided to respondent through an ancillary and verbal FOIA request and is set forth in a letter to Kessler from Mary Ann Petrino, Information and Privacy Staff, Foreign Affairs Document and Reference Center, Department of State (Nov. 19, 1979). C.A. App. 79.

[4] Letter from Richard Gookin, Assistant Chief of Protocol, to Kenneth Rankin (Sept. 11, 1978). C.A. App. 27. This letter was produced to respondent by petitioners pursuant to respondent's First Request for Production of Documents.

[5] The practice of utilizing the "Emergency Fund" for such routine non-emergency matters as home insurance and lawn care for foreign service inspectors has been severely criticized by the GAO, *see* C.A. App. 80-83, and petitioners have represented that this practice would be discontinued. C.A. App. 85.

(1976) is equally general, authorizing the Secretary of State to use the certification procedure for expenditures when "he may think it advisable not to specify" the use. There are no limiting criteria set forth. Defendants concede that clause (A) of Exemption 3 does not apply, for the Secretary of State does have discretion whether to disclose information. It is equally clear that clause (B) cannot properly be invoked, because the statutes specify neither particular criteria nor particular types of material to be withheld.

Under both statutes, the Secretary's total discretion to withhold all expenditures from the Emergency Fund is simply too broad a blanket unqualified dispensation to fall within the exemption. Every statute necessarily will refer, with more or less specificity, to "particular types of matter." In the case of the Emergency Fund, it is undisputed that payments have been made from the Fund for state dinners and receptions, gifts to foreign individuals, expenses of Foreign Service inspectors, and receptions for contributors to the State Department's Fine Arts Committee. To permit the fact that all payments were made from the Emergency Fund to be by itself a sufficient standard to satisfy the "particular types of matter to be withheld" requirement would rob the standard of any meaning.

C.A. App. 160-61 (footnotes omitted).

Although the district court found that the records sought by The Post could not be withheld on the basis of Exemption 3, and although the court at no time found any other exemption of FOIA to be applicable, the court nevertheless ruled that these records were exempt from disclosure. Noting that the statutes relied upon by defendants were of ancient vintage, the court concluded that absent an express legislative choice to require disclosure, more explicit than that contained in FOIA, it would not override the pre-existing statutory structure granting the Secretary discretion to release or withhold

expenditures from the Emergency Fund. Petition at 34a. Ignoring the fact that there was a disputed issue of fact whether expenditures allocated by the Secretary of State to the Emergency Fund had been properly so allocated, the court granted the government's motion for summary judgment and denied The Post's cross-motion. *Id.*

The court of appeals reversed, agreeing with the district court that 22 U.S.C. § 2671 and 31 U.S.C. § 107, the two statutes relied on by the government, failed to qualify under Exemption 3 of FOIA because they neither "establish[] particular criteria for withholding" nor "refer[] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(B)(1976). The court of appeals recognized that 31 U.S.C. § 107 allows the Secretary unfettered discretion to permit or refuse disclosure "as he may think it advisable" and therefore provides no "particular criteria for withholding." *See* Petition at 7a-8a. Both the district court and the court of appeals rejected the government's contention that the phrase "emergencies arising in the diplomatic and consular service" sufficiently identified the "particular types of matters to be withheld" to qualify under Exemption 3. Relying on the particular facts of record in this case, the court of appeals held that

> the Government's submission to the District Court indicates a vast array of matters falling within the "emergencies" rubric ranging from Fine Arts Committee expenditures to travel expenditures for official delegations. 501 F.Supp. at 1158-59. This range does not become particular merely because Congress may have had some opportunity for overseeing it. This statute itself is, therefore, too broad to qualify for Exemption 3 withholding, even as construed by the Department. Petition at 10a.

The court of appeals rejected the district court's conclusion that, despite the unavailability of an FOIA exemption, the material requested need not be disclosed, relying in part on the congressional response to this

Court's decision in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975). Judge McGowan recognized that the "action by Congress to amend Exemption 3 to 'eliminate the gap created in the Freedom of Information Act by the *Robertson* case,' H.R. Rep. No. 880 (Part I), 94th Cong., 2nd Sess. 23 (1976), U.S. Code Cong. & Admin. News (1976), p. 2205," emphatically demonstrated Congress's intent that FOIA must be taken to be "the definitive word on disclosure of the information in the Government's possession covered by it." Petition at 13a. The district court erred when it "went beyond its determination that the material did not fall within the relevant FOIA exemption. . . ." *Id.*

The court of appeals did not, however, order release of the requested documents, instead remanding the case to the district court for a determination of the potential applicability of FOIA exemptions not relied on by the Department of State in the proceedings below.[6] Petition at 14a. Moreover, the court expressly indicated the possibility of a stay permitting the government to seek congressional action if it could establish a sufficient danger to the national interest from any release of documents which might be ordered by the district court on remand. *Id.* at 14a-15a.[7]

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[6] Because the court ruled that Exemption 3 did not apply, it did not reach The Post's alternative argument that the district court also erred in granting summary judgment for the government because there existed material issues of fact whether the requested records were properly classified as expenditures under the statutes relied upon by the government.

[7] On December 28, 1982, the full court of appeals denied rehearing *en banc*, three judges dissenting. Pursuant to a motion filed by the government, the panel, on January 20, 1983, stayed issuance of the mandate for thirty days. On March 29, 1983, the panel granted the government an additional twenty days in which to either file a petition for writ of certiorari or advise the appellate court of its decision not to file. By order dated March 22, 1983, the Chief Justice extended the time for the government to file a writ of certiorari

REASONS FOR DENYING THE WRIT

I. The Government's Petition For Certiorari Is Premature.

Under well settled principles governing the determination whether to grant certiorari, this petition is premature. The government mentions only in passing that the court of appeals ordered release of not a single document requested by respondent. Instead, the court remanded to the district court for a consideration of "the applicability of any other FOIA exemptions, whether raised by the Department of State or by the court itself, *sua sponte*." Petition at 14a (footnote omitted). "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967) (per curiam). It has been held on several occasions that "this Court above all others must limit its review of interlocutory orders." *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916).

This case presents no occasion for the Court to depart from "its normal practice of denying interlocutory review." *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J. dissenting). If and when the district court and the court of appeals determine that the documents sought by respondent must be released, the government will have an opportunity to seek review in this Court on any appropriate grounds,[8] including the applicability of

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to May 27, 1983, and on May 2, 1983, the court of appeals granted the government an additional thirty day stay of the mandate. This petition followed on May 27, 1983, over ten months after the panel of the court of appeals reversed the opinion of the district court on the merits, and five months after the full court of appeals denied rehearing *en banc*.

[8] If, as the Government suggests, expenditures under the Emergency Fund included payment of informers, in addition to funding luncheons and parties, it may well be that the former is protected by FOIA exemptions that the government chose not to rely

Exemption 3. *See Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. at 257-59.

It may be that none of the documents requested will ultimately be ordered released, and it may be that the material ordered released will be limited to such routine items as "official . . . state dinners, luncheons and receptions," [9] gifts to foreign individuals,[10] predictable expenses of Foreign Service Inspectors,[11] and receptions for contributors to the Department of State's Fine Arts Committee [12]—all matters that have concededly been funded through the Emergency Fund. The issue of whether Congress intended that expenditures such as these be shielded from public view, respondent respectfully urges, is not one requiring use of this Court's scant time and resources—particularly where, as here, no final judgment has been rendered and no documents have been ordered released.

II. The Court Of Appeals' Decision Relies On A Well Settled Construction Of Exemption 3 And Is Consistent With The Decisions Of Other Courts Of Appeals.

The court of appeals' application of Exemption 3 is consistent with the standards applied by every other circuit which has considered Exemption 3 in light of the amendment passed by Congress in 1976. As originally drafted, Exemption 3 applied to matters "specifically exempted from disclosure by statute." When this Court in

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on below. *See* 5 U.S.C. § 552(b)(7). The government may also argue on remand that any material which is "authorized . . . by Executive order to be kept secret in the interest of . . . foreign policy," 5 U.S.C. § 552(b)(1) is exempt from disclosure.

[9] C.A. App. 27.

[10] *See* 22 U.S.C. § 2694 (Supp. V 1981).

[11] C.A. App. 38-42.

[12] C.A. App. 79.

FAA Administrator v. *Robertson*, 422 U.S. 255 (1975), interpreted Exemption 3 to mean that Congress intended "to permit the numerous laws then extant allowing confidentiality to stand," Congress swiftly "overrule[d]" the Court by enacting the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1246 (1976). H.R. Conf. Rep. No. 94-1441, 94th Cong. 2d Sess. 14 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2250 (Conference Report); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121-22 n.18 (1980).

Exemption 3 as amended contains two clauses. Clause (A) refers to statutes which require that "matters be withheld from the public in such a manner as to leave *no* discretion on the issue." (Emphasis supplied). As the government concedes, Petition at 13 n.9, this clause can have no application to the instant case, since the two statutes on which petitioners rely, 22 U.S.C. § 2671 and 31 U.S.C. § 107, leave the decision whether to disclose expenditures from the Emergency Fund to the complete discretion of executive officials. *See Irons and Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980).[13]

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[13] That the Secretary of State is free to disclose expenditures is evidenced by the fact that petitioners have already provided The Post, pursuant to an FOIA request, documents revealing the use of the Emergency Fund for such expenditures as support of the State Department's Committee on Fine Arts. C.A. App. 79.

Other expenditures from this Fund which the Secretary has chosen to disclose include the cost of luncheons and receptions for state visits (letter from Richard Gookin, Assistant Chief of Protocol, to Kenneth E. Rankin (Sept. 11, 1978), C.A. App. 27; the cost of gifts distributed by Mrs. Henry Kissinger during travel with the Secretary of State, letter from Stuart W. Rockwell, to Sen. William Proxmire (Nov. 12, 1974), C.A. App. 29; total cost of catered functions hosted by Secretary Kissinger during 1974, letter from Patrick N. Theros, Staff Assistant, Office of the Deputy Under Secretary for Management, to Edward Tropeano (Oct. 7, 1975), C.A. App. 30-32; the cost of a luncheon/cruise hosted by Mrs. Rosalynn Carter for the wives of U.S. Senators and delegates from Panama, letter

The second clause of Exemption 3, clause (B), refers to statutes that "establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld." It is clear from the record in this case, and both courts below so found, that the first part of clause (B) has no application to this case, for neither 22 U.S.C. § 2671 nor 31 U.S.C. § 107 provides any criteria at all, much less "particular criteria," to guide executive decisions regarding disclosure of expenditures from the Emergency Fund. Under Secretary of State Read, in his sworn answers to Interrogatories, admitted that "there are no written policy statements, regulations, guidelines, standards, or criteria other than those set forth in 22 U.S.C. Section 2671 and 31 U.S.C. Section 107" which inform the Secretary whether or not to disclose expenditures from the Emergency Fund. C.A. App. 19-20.

The issue the government seeks to have this Court address, therefore, is the application of the second part of Exemption 3(B) to the particular and unique language of the statute providing for certificate accounting of a discretionary fund of the Department of State—a fund which, by the government's own admission, accounts for under .25% of the total State Department budget. Petition at 13. Because the method of analysis employed below is consistent with other cases decided pursuant to Exemption 3, as amended, and the application of that analysis affects such a discrete and limited category of records, this case is not worthy of certiorari.

In determining whether the statutes relied on by the government sufficiently described the "particular types of

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from Barbara Ennis, Director, Freedom of Information Staff, Department of State, to Thomas Donahue, Executive Vice-President, Citizen's Choice (Oct. 20, 1977) C.A. App. 35-36; the cost of chartering private aircraft to remove American citizens from Teheran, Iran, letter from Under Secretary of State for Management, to Mr. Leo Bourne (Jan. 24, 1980); C.A. App. 37. These letters were produced by petitioners to The Post pursuant to The Post's First Request for Production of Documents.

matter" to be withheld, the district court and the court of appeals first looked to whether the wording of the statutes "evidence a congressional determination that certain materials ought to be kept in confidence." *Irons and Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980). "Nondisclosure is countenanced by Subsection (B), if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978). The legislative history of Exemption 3 demonstrates "congressional sense that the crucial distinction lay between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard." *Id.* at 629 (emphasis in original).

Other courts have uniformly followed the consistent approach of the D.C. Circuit in examining whether the questioned legislation demonstrates a particularized congressional judgment which specifically informed the agency of the purpose and objective of refusing disclosure. *See Ferri* v. *Bell*, 645 F.2d 1213, 1217 n.4 (3d Cir. 1981), *modified*, 671 F.2d 769 (3d Cir. 1982);[14] *Church of Scientology* v. *United States Postal Service*, 633 F.2d 1327, 1330 (9th Cir. 1980); *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *see also Irons and Sears* v. *Dann*, 606 F.2d at 1219-21. Where, as here, the statute provides no guidance and permits the administrator unfettered dis-

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[14] "[W]hen Congress revised Exemption 3 in 1976, it was concerned with removing from its compass laws which gave the agency discretion to withhold any information it wanted . . . . Basic policies regarding government secrecy are to be made by the Legislative, rather than the Executive branch . . ." *Ferri* v. *Bell*, No. 78-841, slip op. at 10 (M.D. Pa. Aug. 20, 1979).

cretion, subject only to his subjective view of the "national interest," the legislative history makes clear, and the courts have uniformly held, Exemption 3 does not apply. *See* H.R. Rep. No. 94-880, Part I, 94th Cong., 2d Sess. 22-23 (1976) (statutes such as "the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *carte blanche* to withhold any information he pleases, would not come within exemption 3."),[15]

The court of appeals additionally inquired whether the phrase "emergencies arising in the diplomatic and consular service" might refer to a discrete category of expenditures so as to itself limit the Secretary's authority to withhold records. Both the district court and the court of appeals recognized, however, that "[e]very statute necessarily will refer, with more or less specificity, to 'particular types of matter' . . . To permit the fact that all payments were made from the Emergency Fund

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[15] In addition to the statute at issue in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), which prohibited disclosure of any document filed with the Administrator when "in their judgment" such disclosure would be contrary to the "interest of the public," 49 U.S.C. § 1504 (1976), Congress also specifically stated that Exemption 3 does not include section 1106 of the Social Security Act, 42 U.S.C. § 1306 (1976), which prohibited the Secretary of Health, Education and Welfare and the Secretary of Labor from disclosing, under penalty of criminal conviction, any record, report or other information submitted to HEW or the Department of Labor except pursuant to regulations prescribed by the Secretary. H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976). Courts have also held that pre-existing statutes relating to FBI "rap sheets," *Ferri* v. *Bell*, 645 F.2d 1213 (3d Cir. 1981), *modified*, 671 F.2d 769 (3d Cir. 1982) (construing 28 U.S.C. § 354), Postal Service investigatory records, *Church of Scientology* v. *United States Postal Service*, 633 F.2d 1327 (9th Cir. 1980) (29 U.S.C. § 410(c)(6)), and the Trade Secrets Act, 18 U.S.C. § 1905, *Westchester General Hospital, Inc.* v. *Department of Health, Education & Welfare*, 464 F.Supp. 236 (M.D. Fla. 1979), do not qualify under Exemption 3 because they leave to the administrative agency, without guidance from Congress, under what circumstances and by what criteria documents may be withheld.

to be by itself a sufficient standard to satisfy the 'particular types of matter to be withheld' requirement would rob the standard of any meaning." Petition at 9a, 29a. If the requirements of Exemption 3(B) are to be met, the "matter" subject to withholding must be identified by Congress and not left to the unfettered discretion of the administrator. *See American Jewish Congress* v. *Kreps*, 574 F.2d at 630-31. In this case, the Secretary has unfettered discretion to determine not only whether an expenditure from the Emergency Fund should be disclosed, but also whether an expenditure should be allocated to the Emergency Fund in the first place.

The government suggests that expenditures from the Fund in fact fall into several quite narrow "categories," Petition at 14, but that suggestion finds no support in the record. Both the district court and the court of appeals recognized that according to "the Government's submission . . . a vast array of matters fall[] within the 'emergencies' rubric, ranging from Fine Arts Committee expenditures to travel expenditures for official delegations." Petition at 10a, 29a-30a. The government fails to identify any limitation imposed by Congress on the "types of matter" covered by the Emergency Fund; each time a new use of the Fund is made, at the complete discretion of the Secretary, a new "category" is created.[16]

The straightforward application of FOIA to the particular statute and facts of record in this case is entirely consistent with the approach taken in similar cases by other circuits. The cases cited by the government, hold-

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[16] Contrary to the government's suggestion, the court below did not find the Fund had been used for "an unduly wide range of purposes," Petition at 14. Respondent contended in the district court, in opposition to the government's motion for summary judgment, that there were material questions of fact in the record regarding whether the Secretary had improperly utilized the fund for routine non-emergency expenditures. C.A. App. 77-83. Because the court of appeals found that the statutes relied on do not satisfy Exemption 3, it did not reach this issue.

ing statutes sufficient to meet the language of Exemption 3, employ the same statutory analysis and arrive at a different conclusion based on the particular language and structure of the statutes in question.[17] This case is readily distinguishable, for example, from the decisions of the District of Columbia and other circuits holding exempt from disclosure information concerning the "organization or any function of the National Security Agency," Pub. L. No. 86-36, Section 6, 73 Stat. 64 (1959),[18] or "intelligence sources and methods" of the Central Intelligence Agency, 50 U.S.C. § 403(d)(3).[19] Those statutes, unlike 22 U.S.C. § 2671 and 31 U.S.C. § 107, provide both a policy which informed the agency

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[17] *See, e.g., De Laurentiis* v. *Haig*, 686 F.2d 192 (3d Cir. 1982) (Section 222(f) of the Immigration and Naturalization Act, 8 U.S.C. § 1202(f) (1976) requiring the Secretary of State to maintain the confidentiality of "records . . . pertaining to the issuance or refusal of visas or permits to enter the United States" except where requested by a court pursuant of a certificate of need, sufficiently identified the "particular types of matter" to be withheld); *see also Medina-Hincapie* v. *Dep't of State*, 700 F.2d 737 (D.C. Cir. 1983) (same); *Chamberlain* v. *Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979) (Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103 (1976), exempt under Exemption 3 because it both sets out the criteria for determining when to withhold (whether disclosure would "seriously impair Federal tax administration"), and narrowly defines the type of information to be withheld); *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979) (Section 122 of the Patent Act, 35 U.S.C. § 122 (1970), requiring patent applications be kept in confidence except in "special circumstances," provides a formula for non-disclosure (to protect the function of the patent office) and clearly identifies the particular matters not to be disclosed); *see also Irons and Sears* v. *Dann*, 606 F.2d 1215 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980) (same).

[18] *See Founding Church of Scientology, Inc.* v. *National Security Agency*, 610 F.2d 824, 827 (D.C. Cir. 1979).

[19] *See Halperin* v. *C.I.A.*, 629 F.2d 144 (D.C. Cir. 1980); *Goland* v. *C.I.A.*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *National Commission on Law Enforcement and Social Justice* v. *C.I.A.*, 576 F.2d 1373 (9th Cir. 1978).

of the congressional purpose for permitting withholding,[20] and categories which delimit the agency's discretion on the types of documents to be withheld.[21]

Finally, the government places great weight on the General Accounting Act of 1980, Pub. L. No. 96-226, 94 Stat. 311, which, *inter alia*, establishes procedures by

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[20] Section 6 of the Classification Act of 1949, Pub. L. No. 86-36, 73 Stat. 64 (1959), 50 U.S.C. § 402 note (1976), directs the National Security Agency to "protect[] information laying open 'the organization and function of the National Security Agency,'" pursuant to a policy to eliminate publicity over NSA's "very classified functions vital to national security," S.Rep. No. 86-284, 86th Cong., 1st Sess. 1 (1959), *see Founding Church of Scientology, Inc.* v. *National Security Agency*, 610 F.2d at 827-28.

Congress, in 50 U.S.C. § 403(d)(3) (1976), explicitly instructed the Director of the CIA to protect "intelligence sources and methods," and commentators have interpreted this section to require "mandatory" nondisclose. *See Goland* v. *C.I.A.*, 607 F.2d at 350 n. 63. Section 403(d)(3) thus involves no discretion on the part of the agency to release or withhold records which fall into the limited category of documents included in the proviso. *See* n.16, *infra*.

[21] The NSA non-disclosure statute expressly refers to "names, titles, salaries or number of persons employed by the agency," 50 U.S.C. § 402 note (1976). To the extent the statute also permits non-disclosure regarding NSA's "activities" in general, *see id.*, the agency's discretion can be strictly limited by the expressed purpose to which the withholding must relate. *See Founding Church of Scientology, Inc.* v. *National Security Agency*, 610 F.2d at 829-833.

The CIA non-disclosure statute similarly limits the range of documents subject to withholding to those that would disclose the "organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency." Section 7 of the CIA Act of 1949, 50 U.S.C. § 403g (1976).

The government somewhat disingenuously asserts that the court of appeals "acknowledged that the statutes involved in this case share 'common origins and general subject matter' with 50 U.S.C. § 403(d)(3)," Petition at 16. In fact, the court below recognized that petitioners' citation to the CIA statutes was unpersuasive because "[t]hese statutes, . . . share *little but* common origins and general subject matter," and "provide[] a vastly more precise blueprint than do the two open-ended statutes relied on in this case." Petition at 11a (emphasis supplied).

which the GAO may audit expenditures accounted for by certificate. *See* 31 U.S.C. § 67(f), recodified at 31 U.S.C.A. § 3524. The GAO Act, although evidencing a general reaffirmation of the certificate method of accounting, neither provides the Secretary of State with criteria by which to exercise his discretion whether to disclose records of the Emergency Fund, nor specifies the types of matters to be withheld. That Act, therefore, does not assist the government in arguing that 22 U.S.C. § 2671, enacted in 1956, and 31 U.S.C. § 107, enacted in 1921, meet the requirements of Exemption 3.

Moreover, the GAO Act is clearly limited to establishing standards and procedures for access to records by the Comptroller General, not by members of the general public. Section 54(b) of Title 31, recodified at 31 U.S.C.A. § 716(b), establishes procedures by which the Comptroller may obtain access to any records, not just those protected by the certificate method of accounting. The Act is structured as an independent access mechanism for the General Accounting Office; it contains its own exemptions that parallel and refer to FOIA exemptions and establishes for the first time the Comptroller General's right to bring a civil action in district court should the agency refuse to comply with a GAO request. *See* 31 U.S.C. § 54(d), recodified at 31 U.S.C.A. § 716(d).[22] The Act does not express a congressional judgment about when and by what criteria any "particular types of matter" should be

[22] In several respects the Act places greater restrictions on members of the Comptroller General's Office than FOIA imposes on members of the general public. In requesting any record, even one freely available to the public under FOIA, the Comptroller must "state the authority for inspecting the records and the reason for the inspection." 31 U.S.C. § 54(b)(1), recodified at 31 U.S.C.A. § 716(b)(1). For members of the general public, FOIA itself provides the authority to inspect agency records, and no reason or other authority for the inspection need be given. Whether it "makes sense" to impose restrictions on access to documents on another branch of government that are not imposed on the public at large is a decision properly left to Congress.

withheld. Indeed, the whole purpose of the statute was to increase GAO's access to records which agencies had been unreasonably withholding. *See* H.R. Rep. No. 96-425, 96th Cong., 1st Sess. 1, 4-9 (1979). Congress did not even hint that the detailed statutory structure (on its face applicable only to the Comptroller General) was intended to supplant or modify the well established standards governing exemptions from FOIA requests received from members of the general public. The proper "reconciliation" of the GAO Act and FOIA is that the former merely permits the preservation of confidentiality, even from the Comptroller General, of records that are otherwise exempt from disclosure under FOIA.

III. The Court Of Appeals Properly Adhered To The Explicit Recognition By This Court That The Nine FOIA Exemptions Are Exclusive.

The government argues that the court of appeals should have authorized withholding even if none of the FOIA exemptions apply. That argument ignores the unambiguous language of the Act and clear holdings of this Court.

If an agency has received a request for records within its possession, FOIA mandates that the agency "shall make the records promptly available. . ." 5 U.S.C. § 552(a)(3). This Court has consistently recognized that FOIA evidences a congressional purpose "of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-61 (1976), *quoting*, S. Rep. No. 812, 89th Cong., 1st Sess. 3 (1965). "Congress provided in § 552(c) that nothing in the Act should be read to 'authorize withholding of information or limit the availability of records to the public, *except as specifically stated* . . .'" *Id.* at 361 (emphasis supplied). The specific statements are contained in the FOIA itself: "They are nine in number and are set forth in § 552(b) . . . 'These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c) . . .,' [*Environmental Protection Agency*

v. *Mink*, 410 U.S. 73, 79 (1973)], and must be narrowly construed." *Department of the Air Force* v. *Rose*, 425 U.S. at 1361. *See also F.B.I.* v. *Abramson*, 456 U.S. 615, 636 (1982) (O'Connor, J. dissenting). It is by now beyond dispute that courts have "no equitable jurisdiction to deny disclosure on grounds other than those laid out under one of the Act's enumerated exemptions." *Getman* v. *NLRB*, 450 F.2d 670, 678 (D.C. Cir. 1971); *see also Allen* v. *C.I.A.*, 636 F.2d 1287, 1289 n.11 (D.C. Cir. 1980).

Completely ignoring the clarity of the relevant legislative history, and utterly disregarding this Court's explicit recognition in *Rose* and *Mink* of the exclusive nature of the FOIA exemptions, the government argues that the FOIA exemptions are not exclusive. The only cases relied upon by the government in support of this novel position, *King* v. *IRS*, 688 F.2d 488 (7th Cir. 1982), and *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979), are not in conflict with the decision below. Both those opinions recognize that International Revenue Code § 6103, 26 U.S.C. § 6103, which permits non-disclosure of a narrowly defined class of "return information" which would seriously impair the federal tax administration, qualified as an Exemption 3 statute. *See King* v. *IRS*, 688 F.2d at 496; *Zale Corp.* v. *IRS*, 481 F. Supp. at 490 n.13; *see also White* v. *IRS*, No. 81-3613 (6th Cir. May 26, 1983); *Chamberlain* v. *Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).[23] The

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[23] To the extent that *Zale* and *King* may be read to suggest that § 6103 of the Internal Revenue Code provides grounds for withholding records apart from the application of Exemption 3, they are distinguishable from this case because § 6103 was enacted *after* the passage of FOIA. The statutes at issue in this case, of course, were enacted *before* the passage of FOIA, *see* n. 1, *supra*, and hence the reasoning of *Zale* and *King* has no application here.

Appellees attempt to remedy this deficiency by reference to the GAO Act of 1980, Pub. L. No. 96-226, 94 Stat. 311. Petition at 6, 20. But, as explained *supra*, there is in fact no conflict between the

decision of the court of appeals that the nine exclusive FOIA exemptions provide the sole grounds on which the Government may rely in withholding documents was mandated by the express intent of Congress and the pronouncements of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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GAO Act and FOIA. The GAO Act establishes procedures for access to records by the Comptroller General and simply permits preservation of the confidentiality of certificate expenditures that are otherwise exempt from disclosure by FOIA.